Case No. 3996

In the

United States Circuit Court of Appeals

For the Ninth Circuit

C. L. BOSS, Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS & PEAKE AUTOMOBILE COMPANY, a corporation, and E. W. A. PEAKE,

Appellees

BRIEF OF RESPONDENT E. W. A. PEAKE

Upon Appeal from the United States District Court for the District of Oregon.

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HOUGHTON-CARSON COMPANY, PRINTERS

INDEX

INDEX TO CASES

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STATEMENT.

This is a suit by the United States to recover the sum of $6,202.65, with interest and penalties, claimed to be due as war excess profits tax from the Boss & Peake Automobile Company, an Oregon corporation, for the year 1917, and against the defendants C. L. Boss and E. W. A. Peake, who are made parties upon the theory that as owners of the corporate stock they have received as dividends and distributions the capital assets of the corporation all of its properties.

Boss admits that the corporation is indebted to the Government for the tax, and that he had sufficient corporate assets to pay the tax, but alleges that between himself and Peake the latter should pay the tax, inasmuch as Boss has already paid one-half.

Peake denies the validity of the tax, denies that demand was made upon him for it and claims that on the 1st day of June, 1917, he sold his stock in the corporation to Boss, and that if any tax is due it is due from the corporation and Boss and not from him. Judge Wolverton found against Boss and in favor of Peake, and decreed that Boss pay the tax. The Government being satisfied with the decree has not appealed, and Boss alone prosecutes the appeal.

Prior to November 8th, 1916, Boss, with one or more partners, was engaged in the sale of automobiles in the City of Portland, under the firm name of C. L. Boss & Company. This partnership had the sales agency for the Hudson and Maxwell cars. In the Fall of 1916 the Hudson Company brought out a new model, known as the Super Six, which immediately became popular and had a ready sale. The partnership was insolvent (transcript 153), but on November 8th, 1916, the defendant corporation was formed with a paid in capital of $30,000.00 which was contributed by Boss and Peake in equal proportions, and each became the owner of one-half of the capital stock, although qualifying shares were transferred to R. E. Murphy and W. H. Bietau.

At the time of the formation of the corporation it was agreed that both Boss and Peake should draw salaries of the same amount—namely, $175.00 a month (transcript 159).

The corporation obtained the agency contracts for the Hudson and Maxwell cars (transcript 125), and embarked upon a very successful career.

Some time in February or March, 1917, the relations between Boss and Peake became somewhat strained, and finally, on or about March 29th Boss presented to Peake a form of written contract (Peake's Exhibit A) whereby Peake should agree to sell his capital stock in the corporation to Boss on July 1st, 1917, at a price to be determined by an inventory of the assets of the company. Boss claims that this plan of sale was Peake's idea, but that when Boss's attorneys prepared the contract Mr. Peake refused to sign it (transcript 170, 171). Peake testifies that he was willing to sell his stock, but that he refused to do so upon an inventory basis (Transcript 274). About May 21st, 1917, Peake ascertained that Mr. McCornack, the representative of the Hudson Motor Car Company, had been in Portland for several days and that Boss had been constantly in his company at his hotel, and evidently being under some apprehension that this secret visit boded no good for him, made inquiry and found that McCornack was about to leave the city without ever having come to the corporation's place of business and without Peake ever having

seen or talked with him. (Transcript 275). He thereupon went to the depot and found Boss, McCornack and McRell in conversation there. The atmosphere was somewhat chilly, although McCornack was civil to Peake, but evidently had been prejudiced against him by Boss, and when Peake tried to explain his side of the controversy McCornack said that he understood that he, Peake, had been trying to give Boss the worst of it, although in what particulars the record is absolutely silent. Peake saw that McCornack was utterly opposed to him and so he dropped out of the conversation. (Transcript, page 275.)

Either immediately before or immediately after McCornack took the train Peake took Boss aside and broached the proposition that Boss had therefore made to buy out Peake on July 1st, and asked him if he would be able to get his money together by June 1st. Boss said he would, and Peake then said: "I will make you a price. I will make you a price of $25,000.00 for the stock and I will expect the salary credit to be paid." To this Boss agreed. (Transcript 276.) It was thereafter ascertained that the salary credit was $1,079.17, and Boss agreed to buy Peake's desk and chair at a price of $57.98, making a total of $26,137.15.

On May 31st Peake prepared his resignation as officer and director of the corporation and on the morning of June 1st delivered 150 shares of stock, endorsed in blank, to Boss, together with the resignation, and re-

ceived from Boss the latter's *personal* check for $26,137.15.

It now appears that Boss obtained this money in the manner following:

Personal loan upon his individual real estate from the Western Bond & Mortgage Co..	$ 8,000.00
Check from the corporation's account.....	8,537.15
Loan from Peake secured by warehouse receipts and title notes on eight Hudson automobiles	9,600.00
	$26,137.15

Thereafter Peake had no further connection with Boss or the corporation (Transcript 223), never participated in its affairs, and Boss and McRell proceeded to run the business, having complete and unquestioned control and possession of all of the assets of said corporation, and for some time there was no difference made in the books of the corporation or in the way it conducted its business. From June 1st to June 19th, numerous checks were signed by the corporation as is disclosed by the stubs in the check book, Peake's "Exhibit J." These checks were signed by the officers of the corporation (Transcript 261), who at that time were Boss and McRell.

The $8,537.15 which was drawn from the corporation bank account by Boss was charged to him on the

books of the corporation, and not to Peake (Transcript 205).

About the middle of June, 1917, Boss and McRell determined to conduct the business as a co-partnership, and thereupon called a meeting of the stockholders, and by appropriate resolution the corporation was dissolved and its assets of every kind and nature were transferred to the co-partnership of Boss and McRell, doing business under the firm name and style of the C. L. Boss Automobile Company, and a bill of sale executed and acknowledged in July, 1917.

Counsel for appellant in their brief (page 33) attempt to make considerable capital out of the fact that Judge Wolverton, in his opinion, 285 Fed. 420, transcript, page 55, uses the language:

> "Another circumstances is that Boss borrowed $8,537.15 from the corporation *on his note* and with this paid Peake in part the consideration for which he sold his stock."

They say that Boss did not give his *note* to the corporation. It is true that the record does not disclose that Boss gave a note, and this was evidently an oversight on the part of the trial judge. It is, however, a mere quibble on the part of the appellant for the meat and effect of the transaction was precisely as the opinion states. The record affirmatively discloses and the appellant himself makes no denial of the fact that Boss borrowed $8,537.15 from the corporation funds by

writing a check to himself for that amount, that this amount is charged against him personally on the corporation books (Transcript 205), and that he put this money in his own bank account and used it with other moneys for the purpose of paying Peake. He thereby became indebted to the corporation for that amount, and it is utterly immaterial whether that debt was or was not evidenced by a note.

Boss never claimed that his transaction with Peake was a distribution of the capital assets among the stockholders, looking toward the dissolution of the corporation, until after the middle of 1920, when the Internal Revenue Income Tax division checked up the books of the corporation and ascertained that it was subject to a heavy tax. When he found that a tax of over $12,000.00 was assessed against the corporation, and in reality assessed against himself and McRell because they had taken over all the assets and properties of the corporation of every kind, he and his partner then proceeded to devise an ingenious scheme to avoid the payment of one-half of the tax by placing it on the shoulders of the man who had sold his stock to Boss over three years before. The methods that Boss and McRell pursued are not such as to commend them to the court. Peake was never informed that the Government was auditing the books or making any claim for taxes. He was never given an opportunity to check this audit or be present when it was being done. He was never informed that Boss was making an ex parte showing to

the Government to the effect that Peake was liable for any portion of the tax, and it was not until after the tax had been assessed and the local officers of the Revenue Bureau had been misled by the affidavits of Boss and McRell that Peake had any inkling of any claim against him. Even then the Revenue Bureau declined to permit him to see the return or the papers in the case unless he first acknowledged that he had assets belonging to the corporation in his possession.

A very significant fact exists in the circumstance that the theory that Boss and McRell pursued in their affidavits to the Government in 1920, is diametrically opposed to the testimony which they gave upon the witness stand in the case. The truth is always consistent with itself, and it is never necessary to make a change of front when frankly stating the facts. It is an earmark of concocted stories that they bear upon their face inconsistencies and contradictions. The trial court looked upon this change of front on the part of Boss and McRell as throwing most serious question upon their credibility, and we quote from the opinion:

> "Referring to the affidavits of Boss and McRell, made at the time the tax was assessed, it will become apparent that Boss then had a somewhat different theory of the supposed division of the assets between himself and Peake; the theory being that there was an equal division of the entire assets of the corporation. McRell concretely states what was then done, from Boss' standpoint, as follows:

'That on said 1st day of June, 1917, a division of the physical assets of said Boss & Peake Automobile Company, a corporation, was had and made by ascertaining from the periodical statement, kept and maintained by said corporation, of the value of all the physical assets, including accounts and estimated profits, and by such division, E. W. A. Peake received in cash the full sum of $26,137.15, which was one-half of the value of said assets, as above set out, together with the value of a certain desk owned privately by E. W. A. Peake, and valued at $53,50, in other words, E. W. A. Peake received one-half of $52,167.30, which was $26,083.65, plus $53.50, making $26,137.15.'

"Boss says, speaking of the alleged agreement of May 21st, that the assets 'were to be divided, 50 per cent going to myself and 50 per cent going to Mr. Peake.' His testimony now shows that the total assets of the corporation were, on June 1st, $52,746.64, of which $22,746.64 was carried in profit and loss account; that $10,000.00 of this amount was paid to Peake, $11,373.32 credited to himself, and $1373.32 passed to surplus account and subsequently divided between himself and McRell, according to their several interests in the co-partnership; so that there could not have been a physical division of assets, as asserted by Boss and McRell in their affidavits addressed to the revenue officers. Nor was there an equal division of such assets.

> There was never an inventory made up of the entire assets, brought down to the date of the culmination of the transaction, and the parties did not deal with reference thereto when they closed their negotiations. This change of position by Boss and McRell is of significance in weighing the testimony pro and con touching the controversy, and in determining what was the real agreement of the parties."

The affidavits of Boss and McRell are obviously untrue, and yet they were made at a time when their recollection of the facts must have been at least as fresh and clear as they were some two years later in the Summer of 1922 when they gave their testimony in the case. We say "obviously untrue" because the statements therein given as to the net worth of the corporation contradict the actual net worth as ascertained by the books which show a net worth of $52,746.64—obviously untrue because the bookkeeper states that no statement was ever taken from the books of the corporation between the 1st of January, 1917, and the date when Peake sold out, and the books for May were not closed until a considerable time after the transaction in question had been fully consummated. (Transcript 330, 343.)

The Government auditor, Weldy (Transcript 235), testifies that the only statement taken from the books which he saw were what he would term "trial balances,"

and on page 239 of the testimony he testifies that there had been no inventory taken of the assets of the Boss & Peake Automobile Company as of June 1st, 1917, and therefore it was impossible to prepare a profit and loss account. These facts are exceedingly important for the reason that a trial balance does not disclose the net assets of a corporation, nor does a profit and loss account disclose the net worth of a corporation, unless an inventory has been taken. (Transcript No. 7.)

Again the affidavits of Boss and McRell are shown to be untrue in that the net worth as established by the Government report does not take into account the salary of Peake and Boss for the reason that they had already charged that off as part of the expense, even though it had not in fact been paid.

The trial court calls attention to the fact that there was no equal division made of the assets of the corporation for the reason that there was credited to Boss from the profit and loss account $1,373.32, and later an additional sum of $1,373.32 was credited to Boss in the sum of $996.21, and to Mr. McRell in the sum of $397.11, showing a total of $2,746.64 over and above the amount that Boss claims was distributed to Peake as a capital return and dividend. It became necessary, therefore, that the appellant and his partner McRell furnish some explanation of this matter, so we have the unique statement that they agreed that this sum should be retained by Boss to meet the current liabilities of the

corporation. But this change of front is of no avail to the appellant because it likewise is obviously untrue and its falsity is established by the audit of the Government. The corporation was engaged in the sale of merchandise and it made an income tax return upon an accrual basis and not upon a cash basis, and in fact was required so to do by law. Therefore in ascertaining its net earnings as of June 1st, 1917, all obligations of the company during the taxable year, whether paid or unpaid, were deductible from the earnings as an expense. Yet the Government audit shows that after making all deductions, including salaries to Boss and Peake, the net income of the corporation for the year 1917 was $22,549.94 (Transcript 95), and in addition thereto there was an ascertained net income for the six weeks in 1916 of $604.21 (Transcript 100).

Therefore the net worth of the corporation as of June 3, 1917, was as follows:

Capital	$30,000.00
Net income for 1917	22,549.94
Net income for 1916	604.21
Total	$53,154.15

In other words, after being allowed by the Government for all expenses of running the business and after deducting the unpaid salaries there was still a balance of assets in excess of the capital investment of $23,-154.15.

But the bookkeeper Murphy says that these credits to Boss and McRell were made by him without instructions from Boss and largely to satisfy his own curiosity as to how the transaction between Boss and Peake actually ended up (Transcript 361).

In arriving at the truth as to this transaction and in order to weigh the evidence of Peake, Boss and McRell, we find a very curious and enlightening piece of testimony from Mr. Boss. It should be noted that in Boss' further and separate answer and defense by way of a cross bill, paragraph V (Transcript 15), it is alleged that an agreement was made on the 23rd day of May, 1917, that the properties of the corporation should be divided by Peake taking over one-half of the properties in kind or money's worth, and that on the 31st day of May, 1917, the properties and assets of the corporation were by agreement between Boss and the defendant Peake divided and it was then agreed that the corporation should be at once dissolved.

In paragraph VI (Transcript 16), it is alleged that on the 1st day of June, 1917, the defendant Peake received his 50% of the properties and assets of the defendant corporation in property, security and moneys amounting to $26,083.65, being one-half of the value of the physical properties and assets of the defendant corporation.

It is evident that Boss became aware of the fact that the Government could not recover against Peake unless

it should be established that the physical assets of the corporation actually came into his possession and that if instead of Peake obtaining the physical assets it was Boss himself who received them, then Peake would not be liable. Boss, of course, knew that what Peake actually received for his stock in the corporation was Boss' personal check for $26,137.15. So we find Boss putting these words into Peake's mouth in describing the transaction at the depot: "I will take title notes on all of the new Hudson cars so that a distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation and sell them to you boys and take title notes and loan you boys the money on the various automobiles so that the dissolution and distribution can be completed."

> "Q. At that time what other things were said, if any, as to how you would arrive at what sums should be paid?
>
> A. Mr. Peake said: 'In doing so I must have my salary, I must have my capital and I must have my net profits which I estimate—net profits I estimate to be $20,000.00 after allowing over $2,000.00 for profit and loss on the notes that were endorsed, the service on the cars that were out and the incidental bills that were not in.' " (Transcript 188.)

Now it must be remembered that at that time no inventory had ever been taken of the physical assets,

the books had not been balanced, the profit and loss account had not been ascertained and was not ascertained until some time after Peake had sold his stock. It is a peculiar circumstance that Peake should have mentioned a figure that closely approximated the actual excess of profits over the sum of $20,000.00. It is further curious that he should have used the language: "I will take the physical assets. I will take the automobiles of the corporation and sell them to you boys," etc., when it is apparent from the actions of the parties that none of them ever had such a thing in mind. What actually happened, was Boss on June 1st found himself disappointed in his negotiations for money and was short $9,600.00, and that Peake loaned him that sum and took as security title notes of the C. L. Boss Automobile Company, together with warehouse receipts upon eight Hudson automobiles (Transcript 147). These notes were entered as bills payable in the books (Transcript 149, 150, 228), and McRell testifies (Transcript 246) that Peake said he would take the note of the C. L. Boss Automobile Company—that is, he would loan money to the C. L. Boss Automobile Company and take new automobiles that were controlled by the Boss & Peake Automobile Company as security for the loan, "these eight automobiles to apply on this loan." This latter statement confirms Peake (Transcript 282, 298, 299, 300, 310) that he took the warehouse receipts and notes as security for the re-payment of the $9,600.00, and in

this Peake is further corroborated by Murphy, the bookkeeper (Transcript 332).

In fact, Mr. Isham Smith, one of appellant's counsel, declined to answer the court's question as to whether or not Peake took these automobiles as security or as a purchase (Transcript 285). As the loan of $9,600.00 was paid the notes were cancelled and the warehouse receipts were surrendered to Boss and McRell. Referring again to the $2,746.64 which was credited to the accounts of Boss and McRell and which represented the profits which they made in the purchase of Peake's stock, if it was found that the sum was not sufficient to cover the current obligations, the service of the cars, etc., the proper and natural course would have been to credit that sum to the partnership itself as a part of its assets to meet these obligations. Instead, however, the partners took the credit to their own personal accounts, showing that they considered it as being something to which they were personally entitled. There is no claim that the partners individually paid these alleged current obligations, and if they did not make these payments individually there is no reason why the surplus in the profit and loss account of the corporation should be placed to their credit unless the entry was made to show the true facts, namely, that in paying $25,000.00 for Peake's stock, Boss had realized a profit of $2,746.64, to a portion of which McRell became entitled as he contributed his share of the capital of the new enterprise.

Counsel took a page in their brief (page 13) to say that the trial court's statement of entries in the combined journal and cash book are out of balance because items for salary and desk and chair are not in the proper column. Not having the books before us we cannot say whether the learned trial judge's stenographer copied the entries from the books accurately so as to place them in the proper column, but the statement as made is so perfectly clear that it makes no possible difference in this case whether the two items should have been in one column or the other and we are at a loss to know why counsel should take the time to discuss it.

The clearing account (appellant's brief 16) became important in this case for two reason: First, it showed that not until June 19, 1917, long after Peake had sold his stock, was it that the C. L. Boss Automobile Company had a bank account, and then only because it had been agreed that this co-partnership should take over all of the assets of the corporation of every kind. The court will note that the call for the stockholders' meeting was sent out on June 14th, 1917, that Boss owned all of the stock of the corporation, and just before he had the corporation formally dissolved the bookkeeper was instructed to make the entries, clearing the moneys of the corporation into the bank account of the C. L. Boss Automobile Company, a partnership.

Another factor which goes to show the transaction between Boss and Peake was not a dissolution and distribution of assets is the fact that the corporation had

a value in addition to its physical assets; it was a going concern and it had a valuable agency contract with the Hudson and Maxwell manufacturers (Transcript 124, 125, 157). According to Peake the good will of the business was worth at least $50,000.00, and Boss, although admitting that the contract was of value, dodged and twisted and refused to put a value on it until finally the court, after repeated questions, gave up all attempt to get him to make a direct answer (Transcript 166). Peake admits that he did not get very much for this good-will, and this is readily explained when we remember that when the factory representative of the Hudson Motor Car Company was in Portland in May that Boss studiously kept him away from the company's place of business, filled his ears with his side of the controversy with Peake, never gave Peake an opportunity to state his contention, and so undermined him with the Hudson Motor Car Company that it became apparent that he must sell his interest in the corporation.

BOSS ASSUMED ALL OF THE LIABILITIES OF THE CORPORATION

According to the testimony of the appellant himself, it was agreed that Peake was to be absolved from the burden of any liabilities of the corporation. We quote from the testimony of the appellant himself (Transcript 144):

"Q. Now, you stated what Mr. Peake took in this dissolution and distribution. What became of the balance of the assets of the Boss & Peake Automobile Company? Who got that?

A. The division would go to me; and I would have the liabilities and the assets of what was left after he had his capital, his net profits, and his salary. I would have mine in the stock and the accounts AND THE LIABILITIES."

And, again, on page 175 of the transcript the appellant testifies:

"Q. Was there any agreement at that time, when the stock was transferred to you, that Mr. Peake was to assume or respond to any of the corporation's liabilities?

"A. No, he was not to assume—respond to anything.

"Q. And the agreement was, was it not, that in that transfer you were to take whatever liabilities there were?

"A. Yes, that is right. I WAS TO TAKE THE LIABILITIES."

An examination of this case from any angle discloses that there never was any attempt to make an equal division of the assets, and that the transaction was purely and simply a sale of stock.

The appellant lays stress upon the fact that on or about June 1st, 1917, he and McRell in compliance with the Oregon laws filed a certificate of doing business under the assumed name of C. L. Boss Automobile Company, and says that this is conclusive that there was an understanding that the corporation had been in fact, if not in law, dissolved, and its assets distributed.

It appears, however, (Transcript 329), that, after Peake had sold his stock, Boss attempted to persuade Murphy to buy some of the stock, that when McRell put up his $5,000.00 it was undecided whether the business would continue as a corporation or under the form of a co-partnership. (Transcript 336). It is of course clear that after Boss bought Peake's stock he did not want the latter's name to further appear in the business and while the situation remained in a state of flux and it was undertermined whether to change the name of the corporation to the C. L. Boss Automobile Company or to form a partnership, a certificate of assumed name must necessarily be filed in order to comply with the Oregon law. (Oregon Laws, Section 7777 et seq.).

It is an odd circumstance that if Peake was interested in having the corporation dissolved that no written contract was entered into and that he signed and endorsed his stock to Boss without in any way protecting himself against the latter if Boss should refuse to complete the dissolution. Is it not true, that after Peake received his money and endorsed his stock to

Boss, the latter would have had a perfect legal and moral right to continue the business as a corporation without interference from Peake? And this even without changing the corporate name. Plainly the determination to continue or dissolve was entirely within the hands of Boss, and over his actions Peake had and could have no control. In fact Boss admits that Peake had nothing to do with the business of the new company after he sold out. (Transcript 223).

Although Murphy was a director of the corporation and in charge of the corporation books, Boss never mentioned to him that he and Peake had agreed upon a dissolution of the corporation, but said that he had bought Peake's stock for $25,000.00, (Transcript 333), and his conversation with Murphy detailed at page 331 of the transcript shows that for months he had been trying to harass Peake until the latter would agree to sell his stock.

The determination of this case depends upon the credibility to be given to the several witnesses. The trial court had the opportunity of seeing them, of observing their demeanor, their apparent hesitation or lack of frankness, and truthfulness. The appellate court is deprived of these aids in determining the facts, and for that reason great weight must necessarily be given to the trial judge's opinion upon these matters. Judge Wolverton decided that Peake and Murphy told the truth, and that Boss and McRell did not. Counsel are

entirely mistaken in assuming that the court found the preponderance of the evidence with regard to the conversation at the depot was in favor of the appellant. On page 38 of their brief they quote from the learned judge's opinion, but unfortunately they omit the portion of the opinion immediately following which puts an entirely different complexion upon the language quoted.

It is true that the court says:

> "Standing alone *and according to the witnesses' full credibility,* Boss would have the preponderance of the evidence in his favor",

but the court continues and says:

> "But the conversation at the depot is not all there is in the record to explain the transaction. The agreement culminated at the bank. We have in what took place there physical facts, which in their evidentiary character are potent, and scarcely to be disputed. In short, Boss assembled his funds and placed them in the bank to his credit, so that he could draw against them. Thereupon he drew his check to the order of Peake, and delivered it to him. At the same time, Peake's stock was assigned in accordance with their understanding, and thus the transaction was closed. Concretely, this was a culmination of the entire agreement. Nothing whatsoever was reserved respecting a dissolution of the corporation. Boss had acquired the stock, and, he being the owner of the other half of the

stock, the corporation was in his hands, to do as he liked with it—to dissolve it, and wind out the business in which it had been engaged, or to continue it as a going concern."

In fact, the opinion of the trial judge contains so fair an analysis, and is so conclusive in its determination that we feel it to be a work of supererogation to attempt to amplify it.

POINTS AND AUTHORITIES

I.

Allegations that corporations "are dissolved" are conclusions of law.

Klamath Lumber Co. vs. Bamber, 74 Or. 292.

Dowd vs. American Surety Co., 69 Or. 418.

II.

The only method of dissolution of a corporation is that provided by the Code.

North vs. United Savings & Loan Assn., 59 Or. 483, 495.

III.

While a corporation is a going concern it may dispose of its assets and no trust follows them.

Macbeth vs. Banfield, 45 Or. 553.
McDonald vs. Williams, 174 U. S. 397, 401.

IV.

Upon the dissolution of a corporation its stockholders become the owners of its assets, subject to a trust in favor of the creditors.

Service vs. Sumpter Valley R. R., 81 Or. 32, 48.
Smyth vs. Kenwood, 97 Or. 19.

V.

Transfer of the entire property of a corporation does not operate as a dissolution.

5 Thompson on Corporations, Sec. 6493, page 1291.

5 Thompson on Corporations, Sec. 6498, page 1296.

VI.

Shares of stock may be sold after dissolution which has the effect of transferring the interest of the stockholders in the corporate assets.

5 Thompson on Corporations, Sec. 6368, page 1367.

VII.

A transferee of shares of stock is liable to the transferor for any sum the latter is required to pay on subsequent calls on the stock.

14 Corpus Juris 705.

VIII.

A court cannot relieve a purchaser from the legal effect of his purchase of stock in a corporation simply because he did not anticipate certain debts.

Mitchell vs. Holman, 30 Or. 280, 285.

IX.

A demand is necessary before the Government can proceed to enforce collection of a tax.

3 Fed. Stat. Ann. 2nd Ed., page 1012, Sec. 3184.
Revised Statutes, Sec. 3184.
Compiled Statutes of 1916, Sec. 5906.

X.

Equity will not follow a trust fund beyond an account in which it is minged with other funds unless its identity can be traced clearly, and equity will assume

that a person checking out of such combined fund is doing so out of the funds not subject to the trust.

> Schwartz vs. Gerhardt, 44 Or. 425, 432.
> Hewitt vs. Hayes, 91 Northeastern Mass., 332, 334.

We have discovered no case in which a transaction of this kind was sought to be classified as a dissolution agreement, or in which a purchaser of stock sought to be reimbursed for obligations of the corporation which he had overlooked in purchasing the stock or of the existence of which he was not aware. There is, however, a decision of the Supreme Court of Oregon by Mr. Justice Bean, now of the Federal bench, which in our judgment settles the law of this case. We refer to

> *Mitchell vs. Holman, 30 Oregon 280; 47 Pac. 616.*

Holman, a stockholder and officer in a corporation, sold his stock. At the time there was due the corporation a sum of money previously earned by the corporation under a contract with the state. Asserting his right to this money, Holman applied to and received the amount from the state, and an action was brought to force Holman to give the purchasers of his stock credit for the amount received by Holman. Holman alleged that in the sale of his and the other stockholders' shares of stock, it was contemplated that he and the other old

stockholders should collect the money at that time due the corporation from the state. This did not appear in any of the papers, but Holman alleged that it was omitted by mutual mistake. However, the Supreme Court held that to establish a mutual mistake there must be clear and satisfactory evidence and that Holman had wholly failed to prove it. The trial court found that the fund in question was not in the minds of the parties when the contract was made, and hence ought to be excluded from the operation of the contract. The Supreme Court, however, found that even if this were true it constituted no ground for relief. The following is quoted from the opinion at page 286:

> "If the parties did not make the contract they intended, or if the legal operation of the one made is different from what they expected, it might, perhaps, have been a sufficient ground for a refusal on the part of Holman to perform, but it affords no defense to this suit. The contract as made has been fully executed, and a court cannot now relieve either party from the legal consequences thereof; 15 Am. & Eng. Enc. Law (1st Ed.), 631. So that, on this record we do not see any grounds upon which the defendant can be relieved from the consequences of his contract, although it seems probable he did not suppose that the legal effect of the sale and transfer of his stock in the corporation would deprive him of the right to collect the money due from the State at that time. Such,

however, is the effect, and the court cannot relieve against a mere mistake of that kind. Archer vs. California Lumber Co., 24 Or. 341 (33 Pac. 526)."

In support of the present transaction being what it appears on its face, we have positive testimony of Mr. Peake and Mr. Murphy, at that time a stockholder and officer of the corporation, and not now associated with any of the parties. The testimony of both of them is that this was purely and simply a sale of stock, and that Mr. Peake had no other thought in mind, and that it was immaterial to him, when once his stock was sold, what was done with the corporation, whether it was continued in the old form, changed its name, or dissolved. In addition, Mr. Murphy testifies that about the time of the sale Mr. Boss suggested to him that he attempt to borrow money from Peake for the purpose of purchasing stock in the corporation.

This testimony seems intrinsically reasonable and probable. Why should Mr. Peake care whether the corporation was dissolved after he sold his stock? It is difficult to conceive a reason. If, however, for some mysterious reason he was insistent upon dissolution, is it probable that he would have parted absolutely with his stock, thus making it impossible for him to force compliance with his demand.

It should be borne in mind, of course, that even if the evidence disclosed dissolution of the corporation immediately after the transfer of the stock, it would not

necessarily follow that Peake had demanded its dissolution. It would be entirely conceivable that the corporation should have been dissolved immediately and yet Peake have had no knowledge that its dissolution was to take place. Even if he knew, that would not constitute a participation in the dissolution. Attention is called to this fact because counsel for Boss seemed to assume that if they have proved that dissolution occurred shortly after Peake sold his stock and that Peake knew it was to occur, he is therefore a party to a dissolution agreement.

However, the evidence not only does not disclose that dissolution did occur immediately afterward, but affirmatively discloses that it did not. We have not only the testimony of Mr. Peake, and Mr. Murphy, but every act of the corporation's officers indicates otherwise.

The books of the corporation were carried on without any change in form, without the ruling of a line. The corporation continued to have a bank account in which all of the receipts of the business were deposited, and from which all of the expeditures of the business were made. The partnership, which it is alleged went into business on June 1st, had no bank account until June 19th, when its bank account was started by a check from the corporation. (Tr. page 168). During the interval between June 1st and June 19th numerous checks were issued by the corporation, as is disclosed by the stubs in the check book, Peake's Exhibit "J". These checks

were signed by the officers of the corporation; (Tr. pages 168, 168). These officers were Boss and McRell.

The trust fund doctrine under which the appellant bases his claim that Peake is liable under no circumstances is applicable to the case at bar. At the time of the transaction the corporation was a going concern, and continued as such and until June 19, 1917, it was not insolvent, but on the contrary was in a highly prosperous condition and had accumulated and had on hand net profits equal to nearly 75% of its invested capital. The so-called trust fund doctrine is never applicable until a corporation has either suspended its business or has become insolvent, and its assets have been placed in the hands of a court of equity for administration and are in the course of final settlement and distribution, and even then it is the capital stock of the corporation which constitutes the trust fund and not its profits.

Thompson on Corporation, 2nd Ed. 3421.

Garetson Lumber Co. vs. Hinson, 69 Or. 605, 609.

In the latter case the Supreme Court uses the following language:

> "The rule has been settled by our adjudications that mere insolvency does not of itself convert corporate property into a trust fund; but when a cor-

poration ceases to transact business and is insolvent, its assets then constitute a trust fund for the payment of the corporate debts without the intervention of a court of equity to administer upon the property for the purpose of a final settlement."

As we have pointed out, this corporation continued to engage in business under the sole control of Boss until June 19, 1917, and then its entire assets and property of every kind were taken over by the co-partnership of Boss and McRell, doing business as the C. L. Boss Automobile Company. It does not appear that this partnership paid any consideration whatsoever for those assets, and the only theory under which the transfer can be sustained is that Boss as the owner of all of the capital stock of the corporation dissolved the same and used those assets as his own.

In the case of Martin vs. City of Lexington, 183 Ky. 714, 210, Southwestern 483, the owners of the stock in a corporation sold and delivered their stock to Martin, which transaction he attempted to construe as a purchase of the assets. After the sale he took charge of the business, mingling his merchandise with that taken over. He was held liable for taxes assessed against the corporation's stock of merchandise in a suit to recover against him as a stockholder. Martin claimed to have purchased the assets and not the stock, but the court in an able opinion holds otherwise. In this case the defendant Peake never received any of the assets

of the corporation. Boss paid for Peake's stock from his own funds. In order to gather the funds he borrowed $8,537.15 from the corporation. He pledged to Peake eight automobiles as security for $9,600,00, which Peake loaned to him. The loan was afterwards paid, and the liens upon the automobiles released, so that there is no possible claim that any assets of the corporation came into Peake's hands, and therefore under no theory of the case can Peake be held liable for the tax.

The decree of the lower court should be affirmed.

Respectfully submitted,

JOHN F. REILLY
and
WINTER & MAGUIRE,
Attorneys for Respondent Peake.

Service of three copies admitted this ..... day of May, 1923.

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Attorneys for Appellant C. L. Boss.

Service of three copies admitted this ..... day of May, 1923.

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Attorney for Appellee U. S. of America.